84-2031

No.

Office - Supreme Court, U.S.
FILED
JUN 28 1985
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

MIRIAM MEIRI,

*Petitioner,*

v.

CLAUDIUS DACON, ROGER WOODS, MARY ANNE MONTEODORISIO, STANLEY McKINLEY, ADELE STERN and THE IMMIGRATION AND NATURALIZATION SERVICE,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTION PRESENTED

Was the granting of summary judgment in this Title VII action an abuse of discretion by the District Court and an error of the Court of Appeals in affirming said judgment, when in the instant situation, there were serious and numerous material issues of fact which were controverted by the Petitioner, and which only could have been resolved by a trial?

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The opinion of Judge RICHARD OWEN of the United States District Court, Southern District of New York, is reprinted in Appendix B.

## JURISDICTION

The appellate decision affirming the judgment of the United States District Court for the Southern District of New York (OWEN, J.) granting the INS's Motion for Summary Judgment and directing that Petitioner's Complaint be dismissed was decided on April 2, 1985 and an Order was entered on said date. This Petition for certiorari is filed within ninety days of the date of that Order in compliance with 28 U.S.C. Section 2101(c). The Court's jurisdiction is invoked under 28 U.S.C. Section 1254

(1), inasmuch as Petitioner is seeking review of an Order issued by the United States Court of Appeals for the Second Circuit.

## STATUTORY PROVISIONS

Title VII, 42 U.S.C. Sec. 2000e-2(a)

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin. . . .

## STATEMENT OF THE CASE

The Petitioner began her employment with the Immigration and Naturalization Service as a Clerk-Stenographer, GS-4 at the New York District Office on May 14, 1979.

The Petitioner was hired for a new position in which the Petitioner was to act as a liaison and contact representative with individuals requesting information from the INS. The Petitioner's immediate supervisor was Claudius M. Dacon. The Petitioner's next level supervisor was Ms. Doris Leone, Chief, RAIS, New York District Office. The Petitioner was hired upon the understanding that she would be performing certain library services, some secretarial work, and that she would be interacting with attorneys and other individuals seeking information.

During the examination before trial of the Petitioner, she stated that her position was not a secretarial job (transcript, page 14). The Petitioner requested on numerous occasions the presentation of a job description for her position, which document was never forthcoming

(T. 17).

During the course of the Appellant's tenure with the Respondent, Ms. Leone retired from the INS with Mr. Dacon temporarily being placed in Ms.Leone's position.

Due to the retirement of Ms. Leone and the subsequent elevation of Mr. Dacon to that position, the latter had the power to recommend the Petitioner for retention or dismissal during her probationary period. On February 26, 1980, Mr. Dacon completed the Request for Review of Employee's probationary or trial period for the Petitioner and on said document rated the Petitioner's performance, "Unsatisfactory", and stated that she "not be retained beyond the probationary period".

The Petitioner was informed of Mr. Dacon's decision in a memorandum to her dated March 3, 1980. The Petitioner then

received a notification that her employment was to be terminated in a letter from Roger W. Woods, Assistant Regional Commissioner, Personnel, Eastern Regional Office, Burlington, Vermont, dated March 19, 1980. Mr. Woods, basing his decision on information from Mr. Dacon, then decided to terminate the Appellant's employment.

The Notification of Personnel Action for the Petitioner states that "employee terminated during probationary period for poor work performance and failure to carry out instruction of supervisor". The Petitioner filed a Complaint of Discrimination on May 19, 1980 with the Equal Employment Opportunity Officer of the INS. The Complaint of Discrimination charged that the Petitioner had been terminated from her employment during her probationary period due to the fact that she is Jewish and a white female. The Petition-

er named Claudius Dacon as the discriminating official inasmuch as he had been her first line supervisor and had initiated the action that led to her termination. Informal resolution of the complaint failed and the complaint was assigned to an investigator for review. During the review, the Petitioner forwarded several sworn statements and affidavits were obtained from both supervisory employees as well as co-employees of the Petitioner. Statements taken from Mr. Frank Palatnick, Consolidations Clerk, and annexed to the official EEO papers as Exhibit 24, indicated that said individual felt that the Petitioner's termination was based upon Mr. Dacon's dislike of her religion although he could not give any specific examples of how Mr. Dacon had displayed this. Mr. Palatnick furthermore states that the Petitioner's work had

been "most diligent" and that she had been "harassed" by Mr. Dacon. Mr. Palatnick further states, as a fellow employee, that the Petitioner "had no problems with any other employee or visiting counsellors".

A statement taken from Ms. Leone for the EEO file and annexed as Exhibit 23 of said file, stated the following "While I was on the scene, I was a buffer between them (Dacon and Meiri). As soon as I left, the supervisory clout was wielded. Had I remained, I would not have recommended Mrs. Meiri's service to be terminated because I believe she could be developed to be of good service to the Government".

By a notification, dated January 21, 1983, the Complaint Adjudication Officer held that the Petitioner's separation during her probationary period was for proper

reasons and not in violation of Title VII. The Petitioner then filed a complaint on January 31, 1983 in the United States District Court, Southern District of New York alleging employment discrimination under Title VII of the Civil Rights Act of 1964 as amended. Jurisdiction was conferred on the Court by 42 U.S.C. Section 2000e-5, 42 U.S.C. Section 1981 et seq., and 28 U.S.C. Sections 1331 and 1343.

The Petitioner proceeded in the lawsuit pro se and requested, on several occasions, that an attorney be appointed to represent her. In a memo endorsement dated October 23, 1983, the Court, Judge Richard Owen, denied her request.

An examination before trial was held of the Petitioner on October 4, 1983 at which time the Petitioner appeared without the assistance of counsel. Thereafter, a motion for summary judgment

dated September 14, 1984 was filed by the United States Attorney representing the Respondents herein.

On October 1, 1984, summary judgment was granted in Respondents' favor dismissing the action. The Petitioner then retained outside counsel and a notice of appeal to the Second Circuit Court of Appeals from the final judgment was filed on November 14, 1984.

## THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

On appeal to the United States Court of Appeals for the Second Circuit, said Court affirmed the judgment of the United States District Court for the Southern District of New York. The Court stated that the trial judge had properly granted summary judgment in this Title VII case, inasmuch as the Petitioner had merely offered conclusory allegations of discrimin-

ation without providing concrete particulars.

The Court furthermore stated at page 2942 of the Decision, footnote 10 "our belief that the grant of summary judgment by the district court may have been somewhat precipitous is bolstered by the de minimis nature of a plaintiff's burden of proof at the prima facie stage".

The Court furthermore stated that a standard whereby an employee, in making out a prima facie case, must demonstrate that she was replaced by a person outside the protected class, is inappropriate and "at odds with the policies underlying Title VII". (Decision p. 2941) (Emphasis supplied) The Court ruled that the proper inquiry should be whether an employer continued to attempt to obtain applicants to fill the position.

## REASON FOR GRANTING THE WRIT

THE GRANTING OF SUMMARY JUDGMENT IN THIS TITLE VII ACTION WAS AN ABUSE OF DISCRETION BY THE DISTRICT COURT AND AN ERROR OF THE COURT OF APPEALS IN AFFIRMING SAID JUDGMENT. IN THE INSTANT SITUATION, THERE WERE SERIOUS AND NUMEROUS MATERIAL ISSUES OF FACT WHICH WERE CONTROVERTED BY THE PETITIONER, AND WHICH ONLY COULD HAVE BEEN RESOLVED BY A TRIAL.

Contrary to the statements contained in the Decision of the Second Circuit Court of Appeals, the Petitioner specifically disputed and presented her side of the argument with regard to the twelve items which were denominated by Petitioner's supervisor as prohibited activities. That these twelve actions, along with the responses of Petitioner, set forth materal issues of fact which could not have properly been resolved on a motion for summary judgment. That more importantly, the issue which was neglected by the Court of Appeals, was that the Petitioner was

proceeding pro se in the District Court action and therefore was not aware of, nor conversant with, the appropriate actions which should have been taken in combating the motion for summary judgment. The abundance of material in the EEO file which was not admitted into evidence before the District Court judge, was the true reason for the granting of the motion for summary judgment. If the Petitioner had presented this documentary evidence from the file obtained through a government investigation, then certainly the District Court Judge would have seen and would have been forced to rule that there were material issues which negated the granting of a motion for summary judgment.

The Petitioner had requested on several occasions, that she be forwarded a job description detailing her exact duties. This document was never forthcoming from

Petitioner's supervisor. The Court of Appeals stated at page 2940"

> "insofar as Meiri repeatedly requested a written description of her job responsibilities, her allegations that the INS provided 'insufficient supervision'... and failed to make her 'aware of just what (its) expectations (were),' ..., find support in the record."

Therefore, the allegations of the Petitioner that inasmuch as no job description was extant, that the employee cannot be accused of not properly performing her services, finds, as the Second Circuit found, support in the record. It is the position of the Petitioner that this Kafkaesque scenario was utilized by Claudius Dacon to accuse the Petitioner of not properly performing her job duties. To therefore accuse the Petitioner of failing to do her job without telling what her job entailed, was certainly not a legitimate basis for termination. It is therefore the position of the Petitioner,

contrary to the finding of the Second Circuit, that she was treated differently from other individuals under the supervision of Claudius Dacon.

A review of the transcript of the examination before trial of the Petitioner clearly indicates numerous instances where a pertinent material issue of fact could only be resolved through the taking of testimony. At page 17, the Petitioner testified that she had asked for a job description when supervisor Claudius Dacon accused her of being too friendly with the attorneys. Dacon promised to present the job description to the Petitioner but he had never given one to her. At page 19 of the transcript, the Petitioner testified that Doris Leone, Mr. Dacon's prior immediate supervisor, had never complained that the Petitioner had spent too much time in speaking to attorneys. At pages 48 and 49, the Petitioner

testified that she had first learned that an error had occurred with regard to the Vice-Consul incident when she was being terminated. Furthermore, at page 49, the Petitioner testified that Claudius Dacon had told her to send out letters with regard to deadlines to be imposed upon other individuals. At page 53 of the transcript, the Petitioner testified that she did not know that she had made a mistake or that her actions were against the rules of the INS until she had been terminated. At page 56, the Petitioner testified that she had first learned about the phone call problems upon beingterminated. These are just a few of the many instances set forth in the transcript of the examination before trial which clearly indicate material issues of fact which could not have been resolved on a motion for summary judgment.

The Second Circuit failed to consider

the fact that the Petitioner proceeded pro se at the District Court level. The Petitioner did not conduct any discovery and was severely hampered by the failure of the Court to appoint counsel for her. This highly significant point must be addressed by this Court in reaching a determination on the merits. As stated in Keller v. Bluemle, 571 F.Supp. 364 (E.D. Pa. 1983), the Court cited Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) and Haines v. Kerner, 404 U.S. 519 (1972) by holding that a pro se complaint is held to a less stringent standard in a Title VII action. The pertinent language in Keller is as follows:

> "He must only introduce sufficient evidence to create a genuine factual issue concerning the existence of a legitimate justification for the action...he may carry this 'burden indirectly by showing that the employer's proffered explanation for his dismissal should not be believed.' Burdine at 256, 101 S.Ct. at 1095. In considering whether plaintiff has

> met this burden, the Court is mindful that plaintiff brings this action pro se. Accordingly, the Court has been careful to consider all relevant arguments contained in plaintiff's complaint and answer to defendant's motion." 571 F.Supp., 364, 369.

It was the decision of Claudius Dacon, and that decision alone, which led to the termination of the Petitioner. Therefore, where it was purely the subjective motivation of the defendant which must be brought to light, this type of issue is not susceptible to a motion for summary judgment, Minor v. Lakeview Hospital, 434 F.Supp. 633 (E.D. Wisc., 1977). The Second Circuit itself stated at page 2946 of its decision:

> "...we are of course mindful that summary judgment is ordinarily inappropriate where an individual's intent and state of mind are implicated."

The Court, however, went on to rule that in this instance, summary judgment would be proper. It is precisely this issue, which must be reversed by this Court.

The Second Circuit, in reviewing the criteria set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 791 (1973) appears to take the position at page 2942 and at footnote 10 on that page, that the Petitioner had offered evidence sufficient to defeat summary judgment at the prima facie stage. The Court, however, stated that the employer's rebuttal was sufficient for the District Court to have allowed the motion for summary judgment to be granted. It is precisely this issue, which must be addressed by this Court.

A review of the examination before trial transcript, as well as a review of the EEO file, will lend strong support to the position of the Petitioner that she had been discriminated against. Specifically, at pages 22 to 24 of the transcript, the Petitioner had indicated the difficulties that she had encountered in asking time off on Friday afternoons in

order to leave early for the Sabbath observance.

A review of the EEO file would indicate that the defendant, Dacon, had admitted that he had no record of the times he had counselled the Petitioner and that no evaluation form for the Petitioner was present in her file. The EEO file would also indicate that all prior terminations investigated by the reviewer had had some pre-dismissal evidence of counselling. These instances clearly indicate disparate treatment of the Petitioner in comparison to other employees under the direction of the defendant Dacon.

The Petitioner should have been granted the opportunity to allow the case to go before a jury at which time the Petitioner would have had the opportunity to confront her accuser in a proper forum. As stated in Powell v. Syracuse University 580 F.2d 1150, 1155 (2nd Cir. 1978), the Court stated, citing Flowers v. Crouch-

Walker Corp., 552 F.2d 1277, 1283 (7th Cir. 1977):

> "The plaintiff need not show perfect performance or even average performance to satisfy this element. He need only show that his performance was of sufficient quality to merit continued employment, thereby raising an inference that some other factor was involved in the decision to discharge him. ...".

The Petitioner had stated in her appeal to the Second Circuit, those reasons and explanations which would have been presented to a jury in response to the twelve accusations of improper activity by defendant Dacon. It is submitted that had the Petitioner been granted this opportunity before a jury, that the jury would have ruled in Petitioner's favor.

Whereas the Second Circuit at page 2943 of the decision stated that the INS had satisfied its burden of production by presenting "undisputed, documented examples of Meiri's inappropriate actions at

work", this ruling flies in the face of the facts. The Petitioner had presented detailed reasons for each one of the "improper activities" at both the District Court and the Appellate level. Furthermore, at page 2944, the Court rules that the INS had presented "undisputed facts" which "established Meiri's profound inability to get along with her co-workers". This additional statement also contravenes the facts and is contrary to the statements contained in the EEO file, which were not presented at the District Court level.

Therefore, the numerous material factual issues which had to have been resolved before a jury, necessitate the reversal of both the District Court and the Court of Appeals decision.

This Court should grant certiorari to decide whether the Second Circuit Court of Appeals and the District Court acted

properly in dismissing this Title VII case on a motion for summary judgment, where the Petitioner was acting pro se at the District Court level.

## CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari to review the judgment of the Second Circuit Court of Appeals should be granted.

Dated: June 24, 1985

Respectfully submitted,

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# APPENDIX

# UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 874 — August Term, 1984

(Argued: February 27, 1985 Decided: April 2, 1985)

Docket No. 84-6337

MIRIAM MEIRI,

*Plaintiff-Appellant,*

*—against—*

CLAUDIUS DACON, ROGER WOODS, MARYANNE MONTEODORISIO, STANLEY MCKINLEY, ADELE STERN and THE IMMIGRATION AND NATURALIZATION SERVICE,

*Defendants-Appellees.*

Before:

KAUFMAN, OAKES, and MESKILL, *Circuit Judges.*

Meiri appeals from a judgment of the United States District Court for the Southern District of New York (Owen, *Judge*) granting the INS's motion for summary judgment and directing that Meiri's complaint be dismissed.

Affirmed.

LLOYD SOMER, New York, New York, *for Plaintiff-Appellant.*

GERALD T. FORD, Assistant United States Attorney, New York, New York (Rudolph W. Giuliani, United States Attorney, Southern District of New York, and Jane E. Booth, New York, New York, on the brief), *for Defendants-Appellees.*

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KAUFMAN, *Circuit Judge:*

This case requires us to address the propriety of granting summary judgment in an employment discrimination suit brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Miriam Meiri alleged she was discharged from her clerk-stenographer position at the Immigration and Naturalization Service ("INS") because of her religion. The district court granted summary judgment in favor of INS, finding that Meiri had failed to establish a *prima facie* case of employment discrimination. Although we are inclined to agree with Meiri that a *prima facie* case was indeed made, we nonetheless affirm the district court's grant of summary judgment because Meiri failed to proffer any evidence suggesting that the stated reasons for her discharge were merely a pretext for religious discrimination.

Mindful that "the court cannot try issues of fact, it can only determine whether there are issues to be tried," *Heyman* v. *Commerce and Industry Co.*, 524 F.2d 1317, 1319-20 (2d Cir. 1975), we shall proceed carefully to limn the relevant facts necessary to resolve the instant confrontation between a claim of employment discrimination based on religion and the pragmatic needs of the judiciary.

## I.

The saga of Miriam Meiri, an Orthodox Jewish woman, began on May 14, 1979, when she was given a conditional appointment by the INS as a clerk-stenographer. Her appointment was subject to a one-year probationary period, during which Meiri was required to demonstrate her fitness for continued employment in the areas of performance, conduct and general character traits.[1] Because the task of determining an employee's occupational aptitude may, in certain instances, be extremely difficult, the INS has instructed its supervisors to "[o]bserve the employee's conduct, general character traits and performance closely." Where circumstances so warrant, the employee is to be separated "without undue formality." The responsibility of assessing Meiri's job performance fell to Claudius Dacon, a black Protestant male, who was the Record Administration and Information Section Supervisor with the INS at 26 Federal Plaza in New York City.

During the first nine months of her employment, Meiri exhibited numerous instances of inappropriate behavior that expressly contravened established INS policy, committed a variety of inexplicable, imprudent and indiscrete acts and generally usurped power wherever possible. We believe it would prove instructive to describe

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[1] According to the INS administrative manual, the one-year probationary period:

> provides the final indispensable test of actual performance on the job, which no preliminary testing methods can approach in validity . . . . [T]he probationary period, properly employed, provides protection against the retention of any person who, in spite of having passed preliminary tests, is found in actual practice to be lacking in fitness, and capacity to acquire fitness, for permanent Government service.

seriatim certain undisputed actions that exemplified Meiri's employment difficulties:

1. Meiri, without authority, wrote a letter to the United States Vice-Counsel in Vancouver, Canada.

2. Meiri, again absent authorization, wrote caustic memoranda to supervisors in other sections. She ordered one supervisor to return certain forms by a deadline that she imposed without authority; Meiri castigated another for alleged violations of timekeeping;[2] and she sent an unauthorized memorandum announcing the promotion of an employee.

3. Meiri criticized the Chief of the Travel Control Unit about matters that were entirely outside her position's limited purview.

4. Meiri composed and mailed an unauthorized letter on official government stationery to an alien, stating that he should contact her to retrieve "important documents" he had lost.

5. Meiri repeatedly interrogated incoming telephone callers, requiring them to respond to a barrage of prying questions.

6. Although Meiri frequently was asked to refrain from conversing with visiting attorneys, she often became

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[2] Because of its acerbic tone, we find it useful to set forth the contents of this memorandum in its entirety:

> It will be greatly appreciated if you don't make my timekeeping job more difficult and confusing by erasures, late disclosures of hours worked and general indifference to required, official procedure. Freedom, independence and not having to account to anybody about anything is terrific I know, but they don't fit into the service and cannot be appreciated when I am prevented from properly fulfilling my duties—so please be cooperative for a change.

Meiri characterized this memorandum as "friendly."

embroiled in disputes over "political affairs" or "current events."

7. By speaking to visiting attorneys and others in Hebrew, French, Italian, German and Spanish, Meiri violated the INS policy prohibiting employees from speaking to visitors in foreign languages.

8. Meiri acknowledged that she had occasionally consoled employees after they had been reprimanded by Dacon, and discussed with them possible avenues of recourse.

Prompted by this series of events, Dacon made several attempts to counsel Meiri and provide her with guidance. His efforts, however, appear to have been unavailing. Finally, on February 21, 1980, Dacon met with Meiri to repair their damaged relationship and stem the mounting tide of improper actions. Again, his efforts at constructive criticism were met only with resistance, as Meiri announced she was fully satisfied with her job performance and, thus, was entirely unwilling to accept counseling. Angered by her recalcitrance and utterly disappointed with her job performance, Dacon, on March 3, informed Meiri that he would recommend she be terminated during her probationary period. On March 19, the INS informed Meiri she would be terminated on March 28, 1980.[3]

Believing her discharge was motivated by racial and religious animus, Meiri filed a formal complaint with the INS. An Equal Employment Opportunity officer in-

[3] After Meiri was discharged, her position as clerk-stenographer remained vacant for approximately one year, during which time Dacon searched for a suitable replacement. Eventually, the duties associated with this position were assumed by other employees and the personnel office ultimately decided to eliminate the position.

vestigated the circumstances surrounding Meiri's termination and, in a report issued on June 2, 1981, found her discharge was based on "an acceptable and equitable decision" by her supervisor. On January 21, 1983, the complaint adjudication officer for the Department of Justice similarly concluded that Meiri's separation was for lawful reasons and did not violate Title VII.

Ten days later, the travails of Meiri began anew in the United States District Court for the Southern District of New York. There, Meiri filed a Title VII suit, *pro se*, alleging the INS had discriminated against her because she was Jewish.[4]

On April 7, 1983, the INS filed an answer, in which it denied Meiri's allegations of religious discrimination, buttressing this denial with twelve job-related complaints proffered by Dacon. Of these, Meiri disputed the accuracy of only four, conceding that the remaining eight were true. She did, however, posit exculpatory explanations for certain of her actions. Once again, Meiri admitted the verity of Dacon's charges when the INS took her deposition in October 1983. Armed with a number of undisputed facts that would appear to establish that Meiri was terminated for legitimate, nondiscriminatory reasons, the INS moved for summary judgment on December 15,

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[4] In addition to the INS, Meiri's complaint named five individuals as defendants: (1) Mr. Dacon; (2) Adele Stern, Dacon's Secretary; (3) Maryanne Monteodorisio, the local personnel officer; (4) Roger Woods, the INS Assistant Regional Commissioner for personnel; and (5) Stanley McKinley, the INS Regional Commissioner. On December 15, 1983, the defendants moved to dismiss the INS and the individual defendants as improper parties and to substitute Alan C. Nelson, in his official capacity as INS Commissioner, as the sole defendant pursuant to 42 U.S.C. § 2000e-16(c). The district court granted this motion, and dismissed the claims against the named defendants. Meiri does not challenge this ruling on appeal.

1983. In support of its motion, the INS offered the affidavits of Claudius Dacon, Adele Stern (Dacon's secretary who was Jewish) and Joseph Schleifer (an Orthodox Jew who also worked for Dacon), as well as documented evidence of Meiri's inappropriate actions. Three days later, on December 18, 1983, Meiri submitted answering papers,[5] in which she propounded by reference to subjective criteria that her termination was animated by religious discrimination.[6] Oral argument was heard on February 10, 1984.

On October 1, 1984, Judge Owen granted the INS's motion for summary judgment and dismissed Meiri's complaint. The district court concluded that Meiri had failed to establish a *prima facie* case of employment discrimination because she was not qualified for the position from which she was terminated and because she was not replaced by a person outside her protected class. Judge Owen relied extensively on the reasons for termination proffered by Dacon and conceded by Meiri. He also found particularly inappropriate Meiri's "habit of engaging certain attorneys and other INS visitors in unnecessary conversations" in foreign languages. In a footnote, the district judge noted that even if the evidence could be construed to establish a *prima facie* case of discrimination, the INS demonstrated that Meiri was terminated for legitimate, nondiscriminatory reasons. Insofar as Meiri "presented no evidence whatsoever to show that these reasons were a pretext for discrimination," Judge Owen decided summary judgment was proper. Meiri, now represented by counsel, appeals.

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[5] The district court treated these papers, which demanded judgment in her favor, as a cross-motion for summary judgment.

[6] By letter dated February 20, 1984, Meiri submitted twenty-four exhibits to the court to substantiate her claim of employment discrimination.

## II. Proof In A Title VII Case

In striking contrast to the welter of decisional law spawned by those courts that have toiled in the amorphous vineyards of Title VII,[7] the controlling legal standards appear deceptively straightforward:

> First, the plaintiff has the burden of proving by a preponderance of the evidence a *prima facie* case of discrimination. Second, if the plaintiff succeeds in proving the *prima facie* case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." . . . Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

*Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-53 (1981) (quoting *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 791, 802 (1973)); *see United States Postal Serv.* v. *Aikens*, 103 S. Ct. 1478, 1481-82 (1983).

This trifurcated inquiry not only specifies and assigns evidentiary burdens, but also injects a fine-tuning element into the presentation of proof in all Title VII cases. The net result is that an initially vague allegation of discrimination is increasingly sharpened and focused, until the

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[7] The provision of Title VII, 42 U.S.C. § 2000e-2(a), on which Meiri principally relies, provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to *discharge* any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, *religion*, sex or national origin . . . . (emphasis added).

ultimate inquiry is one that is amenable to judicial resolution.[8]

In the action before us, we are called upon to determine whether the district court's grant of summary judgment at the *prima facie* phase was precipitous and, if so, whether summary judgment was appropriate at the "pretext stage." In so doing, we must wrestle with the peculiarities of and interrelationships among the three inquiries, as well as address the propriety of granting summary judgment in discrimination actions, where motivation and intent are crucial. It is to these questions that we now turn.

A. *Prima Facie Case*

To establish a *prima facie* case of termination based on religious discrimination, Meiri must show: (i) that she belonged to a protected class, (ii) that her job performance was satisfactory, (iii) that she was discharged and (iv) that, after she was discharged, "the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas*, *supra*, 411 U.S. at 802. In granting summary judgment in favor of the INS, the court below concluded that Meiri failed to adduce sufficient evidence to warrant a trial on whether she could establish a *prima facie* case of religious discrimination. Relying on the litany of work shortcomings proffered by Dacon and conceded by Meiri, the district judge found that Meiri had failed to raise any factual issues concerning her job performance. In addition, Judge Owen held that because Meiri did not demonstrate that her clerk-stenographer position was filled by a "person outside of her protected

[8] Although judges strive to be "the master of both microscope and telescope," in practice, we tend to be more adroit at resolving the narrow inquiry. C. Hughes, *Mr. Justice Brandeis* 3 (F. Frankfurter, ed. 1932).

class," she could not even make out a *prima facie* case of discrimination. We question these rulings.

In determining whether an employee's job performance is satisfactory, courts may—as they often must—rely on the evaluations rendered by supervisors. *See Knight* v. *Nassau County Civil Serv. Comm.*, 649 F.2d 157, 162 (2d Cir. 1981). After all, job performance cannot be assessed in a vacuum; the ultimate inquiry is whether an employee's performance "meets his employer's legitimate expectations." *Huhn* v. *Koehring Co.*, 718 F.2d 239, 244 (7th Cir. 1983); *see Kephart* v. *Institute of Gas Technology*, 630 F.2d 1217, 1223 (7th Cir. 1980); *Reich* v. *New York Hosp.*, 513 F. Supp. 854, 859 (S.D.N.Y. 1981). Although courts must refrain from intruding into an employer's policy apparatus or second-guessing a business's decisionmaking process, *see, e.g., Sweeney* v. *Research Foundation of the State Univ. of N.Y.*, 711 F.2d 1179, 1187 n.11 (2d Cir. 1983), they must also allow employees "to show that the employer's demands were illegitimate or arbitrary," *Kephart, supra*, 630 F.2d at 1223. As evidenced by her deposition, complaint and affidavit, Meiri has, in effect, questioned the legitimacy of her employer's expectations. Moreover, insofar as Meiri repeatedly requested a written description of her job responsibilities, her allegations that the INS provided "insufficient supervision," *see Reich, supra*, 513 F. Supp. at 859, and failed to make her "aware of just what [its] expectations [were]," *Kephart, supra*, 630 F.2d at 1223, find support in the record.

Furthermore, although certain courts—including the district court in this action—have required an employee, in making out a *prima facie* case, to demonstrate that she was replaced by a person outside the protected class, *see Lee* v. *Russell County Board of Education*, 684 F.2d 769,

773 (11th Cir. 1982); *Wade* v. *New York Telephone Co.*, 500 F. Supp. 1170, 1176 (S.D.N.Y. 1982), we believe such a standard is inappropriate and at odds with the policies underlying Title VII. From a practical perspective, requiring a plaintiff to demonstrate that her job was filled by a "person outside the protected class" could create enormous difficulties involving the identification of the protected class. In this case, for example, it is unclear whether the protected class would be followers of Orthodox Judaism or followers of Judaism generally.

We believe the appropriate inquiry should be whether the employer continued to seek applicants to fill the position. After Meiri's discharge, Dacon attempted to find a suitable replacement for the clerk-stenographer job. The fact that the position was ultimately eliminated is of little relevance and should not sound a death knell to Meiri's Title VII claim. The elements of proof in employment discrimination cases were not intended to be "rigid, mechanized or ritualistic." *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 577 (1978); *see Loeb* v. *Textron, Inc.*, 600 F.2d at 1003, 1017 (1st Cir. 1979). Rather, they were intended only to promote the general principle that a Title VII plaintiff must carry the initial burden of offering evidence adequate to "raise[] an inference of discrimination." *Furnco, supra*, 438 U.S. at 577; *see also International Brotherhood of Teamsters* v. *United States*, 431 U.S. 322, 358 (1977). When examined against these conceptual underpinnings, we believe the fact that Meiri was not replaced by a non-Jew—indeed, she was never replaced—may weaken, but certainly does not eliminate, the inference of discrimination.[9]

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[9] Were we to adopt a mechanical approach, we would be required to exempt from Title VII coverage an employer that, in further-

[Footnote continued on following page]

Assuming *arguendo* that Meiri did in fact offer evidence sufficient to defeat summary judgment at the *prima facie* [10] stage, we must now address whether the INS satisfied its burden of rebuttal.

B. *Employer's Rebuttal*

Because establishment of the *prima facie* case creates an inference that the employer unlawfully discriminated against the employee, the burden then falls upon the employer to produce evidence that the employee was discharged for a legitimate, nondiscriminatory reason.[11] *See Burdine, supra*, 450 U.S. at 254. Placing this burden of production on the employer serves a dual purpose. First, it enables the employer, by proffering legitimate reasons for the alleged discriminatory discharge, to rebut

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[Footnote continued from previous page]

ance of a broad-based policy of employment discrimination, discharged one hundred minority employees, retained nine hundred non-minority employees, and, by making additional overtime available to the nine hundred retained employees, found it unnecessary to replace any of the discharged employees. Clearly, such an employment policy vitiates the letter and spirit of Title VII, and should not be immune from proscription by reason of an overly formalistic interpretation of the elements comprising the *prima facie* case. Indeed, in *Connecticut* v. *Teal*, 457 U.S. 440 (1982), the Court stated that "Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired. That answer is no more satisfactory when it is given to victims of a policy that is facially neutral but practically discriminatory." *Id.* at 455.

[10] Our belief that the grant of summary judgment by the district court may have been somewhat precipitous is bolstered by the *de minimis* nature of a plaintiff's burden of proof at the *prima facie* stage. *See Sweeney, supra*, 711 F.2d at 1184. In any event, Title VII's sophisticated evidentiary calculus augurs against tarrying long over this question.

[11] Because it is incumbent upon the employee to prove that the nondiscriminatory reason was pretextual, the employer need not *prove* the absence of discriminatory motive or that the discharge was motivated by a legitimate reason. *See Loeb, supra*, 600 F.2d at 1012.

the inference of discrimination that arises from proof of the *prima facie* case. In addition, the burden of production frames the factual issue with sufficient clarity to afford the employee a full and fair opportunity to demonstrate pretext. To this end, the employer's explanation of its reasons must be clear and specific. *See Loeb, supra*, 600 F.2d at 1011-12. Were vague or conclusory averments of good faith sufficient to satisfy the employer's burden, Title VII employees seeking to demonstrate pretext would be unfairly handicapped. *Cf. Alexander* v. *Louisiana*, 405 U.S. 625, 632 (1972) (averments of good faith in individual selections cannot dispel *prima facie* case of systematic discrimination).

To a large extent, of course, the strength or weakness of the inference of discrimination created by the employee's *prima facie* case defines the nature of the employee's rebuttal.[12] Because Meiri's clerk-stenographer position was never filled, the inference of religious discrimination was weakened and the burden on the INS to produce evidence that she was in fact terminated for a legitimate nondiscriminatory reason was commensurately less onerous. It may be argued, however, that the inference of discrimination is far more powerful in employee discharge cases than it is in the context of failures to hire or to promote. Although it is difficult to measure precisely the strength or weakness of the inference of discrimination, we believe it is clear that the INS satisfied its burden of production by proffering a veritable arsenal of undisputed, documented examples of Meiri's inappro-

[12] Although courts have fashioned a tripartite construct to evaluate Title VII claims, we must withstand the temptation to treat each stage as an independent inquiry. Indeed, the efficacy of employment discrimination law depends upon the interdependence of the *prima facie* case, the employer's rebuttal and proof of pretext. *See Lieberman* v. *Gant*, 630 F.2d 60, 66-67 (2d Cir. 1980) (noting relationship between employer's rebuttal and employee's proof of pretext).

priate actions at work. Indeed, the overwhelming evidentiary presentation provided an ample basis for a trier of fact to find that Meiri's discharge was based not upon a discriminatory animus, but rather upon an honest belief that her job performance simply did not measure up to that required of probationary employees.

In addition to demonstrating Meiri's usurpation of authority and her contravention of prescribed INS policies, the undisputed facts also established Meiri's profound inability to get along with her co-workers. This represents a legitimate, nondiscriminatory reason for an employment decision. *See Johnson* v. *Allyn & Bacon, Inc.*, 731 F.2d 64, 73 (1st Cir.), *cert. denied*, 105 S. Ct. 433 (1984); *Frausto* v. *Legal Aid Society*, 563 F.2d 1324, 1328-29 (9th Cir. 1977). The fact that the INS did not merely articulate—but substantially established—legitimate, nondiscriminatory reasons for her discharge rendered more difficult Meiri's task of proving pretext.[13]

C. *Proving Pretext*

After the employer articulates legitimate, non-discriminatory reasons for the employee's discharge, the employee must be afforded an opportunity to prove the existence of factual issues demonstrating that the stated reasons were merely a pretext for discrimination. *See Burdine, supra*, 450 U.S. at 256-57. An employee may satisfy this ultimate burden "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* at 256.

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[13] The reasonableness of the employer's reasons for discharge is, of course, probative of the question whether they are pretexts. "The more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext." *Loeb, supra*, 600 F.2d at 1012 n.6.

In evaluating the propriety of granting summary judgment at the pretext stage, we are mindful that "the court must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought, with the burden on the moving party to demonstrate the absence of any material issue genuinely in dispute." *Patrick* v. *LeFevre*, 745 F.2d 153, 161 (2d Cir. 1984). We believe the INS met this burden by supporting its motion for summary judgment, pursuant to Fed. R. Civ. P. 56(c), with depositions and affidavits setting forth numerous undisputed examples of inappropriate behavior exhibited by Meiri during the course of her probationary period and demonstrating that Dacon did not act in a discriminatory manner toward other Jewish employees. Meiri was then required to offer evidence that the reasons for her discharge were other than those assigned by the INS; that the stated reasons were merely a pretext for religious discrimination. *See* Fed. R. Civ. P. 56(e); *Barnett* v. *Howaldt*, Nos. 84-7581, 84-7583, Slip Op. 2361, 2366-67 (2d Cir. March 6, 1985); *Patrick*, *supra*, 745 F.2d at 158-60.

Although Meiri alleged that "[Dacon] conspired to get rid of [her]"; that he "misconceived [her] work habits because of his subjective prejudice against [her] Jewishness"; and that she "heard disparaging remarks about Jews, but, of course, don't ask me to pinpoint people, times or places . . . . It's all around us," such conclusory allegations of discrimination are insufficient to satisfy the requirements of Rule 56(e). *See Zahorik* v. *Cornell Univ.*, 729 F.2d 85, 94 (2d Cir. 1984); *Mason* v. *Continental Illinois Nat. Bank*, 704 F.2d 361, 366 (7th Cir. 1983); *Nash* v. *Jacqueline Cochran, Inc.*, 548 F. Supp. 676, 678 (S.D.N.Y. 1982) (Weinfeld, *J.*); *Reich*, *supra*, 513 F. Supp. at 861.

In so concluding, we are of course mindful that summary judgment is ordinarily inappropriate where an individual's intent and state of mind are implicated. *See Patrick, supra,* 745 F.2d at 159. The summary judgment rule would be rendered sterile, however, if the mere incantation of intent or state of mind would operate as a talisman to defeat an otherwise valid motion. Indeed, the salutary purposes of summary judgment—avoiding protracted, expensive and harassing trials—apply no less to discrimination cases than to commercial or other areas of litigation. *See Nash, supra,* 548 F. Supp. at 678.

As we have stated, "[a] party opposing a motion for summary judgment simply cannot make a secret of his evidence until the trial for in doing so he risks the possibility that there will be no trial." *Donnelly* v. *Guion,* 467 F.2d 290, 293 (2d Cir. 1972). Meiri has provided no indication that any evidence exists that would permit the trier of fact to draw a reasonable inference of pretext. She has offered no evidence suggesting that the INS's treatment of her differed from that accorded other non-Jewish employees; that the INS departed from its general policies in discharging her; or that non-Jewish persons on probation who acted similarly were retained.

To allow a party to defeat a motion for summary judgment by offering purely conclusory allegations of discrimination, absent any concrete particulars, would necessitate a trial in all Title VII cases. Given the ease with which these suits may be brought and the energy and expense required to defend such actions, we believe the trial judge properly granted summary judgment.

III.

Accordingly, the judgment of the district court is affirmed.

OWEN, District Judge

Plaintiff Miriam Meiri was employed by the United States Immigration and Naturalization Service (INS) for one year in a Career Conditional appointment as a clerk-stenographer GS-4. Career Conditional appointments are subject to a one-year probationary period during which the employee is evaluated with a view toward a permanent appointment if his or her performance and conduct are adequate. Plaintiff was not retained past her probationary period and, after her discrimination complaint to the Equal Employment Opportunity Commission was rejected, she brought the instant action, alleging that she was not given a permanent position because of religious discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e et seq.

Defendants now move for summary judgment, pursuant to Fed.R.Civ.P.56, asserting that plaintiff has failed to make out a prima facie case under the standards of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1972). Plaintiff, proceeding pro se has cross-moved for summary judgment.[1/] For the reasons set forward below, summary judgment is granted to defendants and this action is dismissed in its entirety.

In addition to INS, plaintiff has named her former supervisor and several other INS employees as individual defendants. It is well settled that, pursuant to Section 717 of the Civil Rights Act, 42 U.S.C. Sec. 2000e-16, the only proper defendant in an action for discrimination by a federal agency is the head of that agency or department. Brown v. GSA, 425 U.S. 820 (1976); White v. GSA, 652

652 F.2d 913, 916-17 (9th Cir. 1981). Plaintiff has not alleged any conduct on the part of any of the individual defendants which could possibly justify an exception to this rule and Alan C. Nelson, in his official capacity as INS Commissioner, is therefore the only appropriate defendant to this action. 42 U.S.C. Sec. 2000e-16, Hackley v. Roudebush, 520 F.2d 108, 115 (D.C. Cir. 1975).

As to the INS, I find that plaintiff has failed to establish a prima facie case of discrimination sufficient to shift the burden of going forward to the defendant. In order to make out a prima facie case of discriminatory termination, a plaintiff must show that he or she (1) is a member of a protected class, (2) was qualified for the position held, and was (3) discharged and (4) replaced by a person outside of the

protected class. Lee v. Russell County Board of Education, 684 F.2d 769, 773 (11th Cir. 1982).

Here the evidence clearly shows that, while plaintiff, an Orthodox Jew, is a member of a protected class and was discharged, she was not qualified for the position from which she was terminated. Claudius Dacon, plaintiff's former supervisor and a named defendant, listed twelve reasons for her termination. While plaintiff contests Mr. Dacon's description of certain of the incidents which formed the basis of these reasons, she concedes that other incidents Mr. Dacon cites did occur. The undisputed incidents for which plaintiff was terminated include: the unauthorized sending of a letter to the United States Vice-Counsel in Vancouver, Canada; the sending of a harsh note to the supervisor of another unit criti-

cizing the handling of timekeeping procedures; 2/ and the unauthorized mailing of a letter on official government stationery to an alien requesting that he contact her regarding what she described as "important documents".

One of the more serious of plaintiff's failings in her job was her habit of engaging certain attorneys and other INS visitors in unnecessary conversations in foreign languages. This was a matter of particular concern to the INS because it had, at the time, been the focus of charges of favoritism in its procedures. Mr. Dacon's affidavit indicates that he attempted to discuss this and other problems with plaintiff, but that she was impatient and unresponsive. Plaintiff continues to assert that it was her right to engage in these conversations. ("I am guilty of talking with intelligent individuals in languages which I learned in school when-

ever the occasion presented itself." Plaintiff's "answer" to defendants' answer, April 18, 1983 at p. 4).

These and other incidents described in the record demonstrate that plaintiff was simply not qualified for a permanent INS position. The Federal Personnel Manual and the INS Administrative Manual, Sections 223101 and 2231.02 provide that:

> During the probationary period, the employee's conduct and performance in the actual duties of the position may be observed and, if circumstances warrant, the employee may be separated without undue formality.

In this case, plaintiff broke too many rules and, apparently without realizing it, was just too difficult a person to work with to be offered a permanent job. As plaintiff has failed to demonstrate that she was qualified for the job from which she was terminated, she has failed to establish a prima facie case of dis-

crimination. I also note that, plaintiff's position was eliminated after she was terminated, so she was not "replaced by a person outside the protected class." 3/

Summary judgment is granted in defendant's favor and this action is dismissed.

So ordered.

United States District Judge

Dated: September 26, 1984
New York, New York

## FOOTNOTES

1/ After unsuccessful attempts to find an attorney to handle this case, plaintiff requested that I appoint counsel to represent her. I denied this request in October 1983, stating that on the record as of that date, it did not seem appropriate. It was clear at that point that the government intended to rely for its defense on the twelve reasons for termination of which plaintiff had already been made aware in the INS and EEOC proceedings which preceded this litigation and which, in certain respects, she had conceded were accurate.

Furthermore, plaintiff has not offered any evidence that she is unable to afford a private attorney or suggested how her relatively competent prosecution of this matter was impeded in any meaningful way by her lack of counsel.

2/ In her deposition, plaintiff referred to this letter, which the government accurately describes as "acerbic," as a "friendly note." Her insensitivity to the likely effect of her words is consistent with Mr. Dacon's description of her as someone who was difficult to supervise or work with in an office situation.

3/ Even if the record could be viewed as establishing a prima facie case of discrimination, sufficient to shift the burden of going forward, defendants have more than met that burden by demonstrating that plaintiff

was terminated for legitimate, non-discriminatory reasons. Furthermore, plaintiff has presented no evidence whatsoever to show that these reasons were a pretext for discrimination, and defendants have submitted the affidavits of two other Jewish INS employees to whom plaintiff referred in her deposition, stating that they were never discriminated against in any way by Mr. Dacon. Thus, even if I view the record as the rebuttal of "the presumption of discrimination" required after a prima facie case is established, summary judgment in defendants' favor is appropriate. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).